ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination	)	

COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.
REGARDING PACIFIC BELL'S PROPOSED NON-STRUCTURAL SAFEGUARD PLAN

Pursuant to the Federal Communications Commission's ("FCC's" or the "Commission's") Public Notice (DA 95-1655), issued on July 26, 1995, AirTouch Communications, Inc. ("AirTouch") hereby submits the following comments regarding the above-captioned plan submitted by Pacific Bell and affiliated companies (collectively "Pacific Bell").

INTRODUCTION

Pacific Bell's proposed plan sets forth what it believes to be adequate non-structural safeguards to allow it to provide Personal Communications Services ("PCS") without the creation of a "structurally separate subsidiary for regulatory purposes."[1] It is

[1] Pacific Bell Plan at 4, n.9.

especially important that the Commission review Pacific Bell's proposed PCS competitive "safeguard" plan carefully because it is the first such plan to be reviewed by the FCC and because Pacific Bell is the only Bell operating company ("BOC") -- and one of the very few large local exchange telephone carriers ("LECs") in the country -- that is currently permitted by the FCC's rules to have up to 40 MHz of broadband PCS spectrum through-out its own local wireline telephone service area.

AirTouch is one of the premier wireless communications companies in the world.[2] Operating cellular, paging, and other wireless services across the United States and in many countries in Europe and Asia, AirTouch has successfully brought the benefits of wireless communications to millions of people. As a company committed to technological excellence and innovation, AirTouch has been a leader, both directly and through its partnership with others in PCS PrimeCo, in efforts to bring the enormous benefits of PCS to the American public quickly Those efforts have included AirTouch's active involvement in the Commission's proceedings that have been successfully creating rules to promote fair wireless competition. It is in that spirit of fair competition that AirTouch is submitting these comments.

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[2] AirTouch was formerly a subsidiary of Pacific Telesis Group, the parent company of Pacific Bell. On April 1, 1994, AirTouch was spun off from Pacific Telesis Group and is now a completely independent company. AirTouch provides, directly and indirectly, cellular services through-out much of the area that will be served by Pacific Bell's proposed PCS operations.

PROCEDURAL ISSUES

By quickly filing its proposed plan for the establishment of non-structural PCS safeguards, Pacific Bell has properly recognized the importance of beginning this approval process early so that there will not be any unnecessary administrative delay in bringing new, competitive wireless services to the public. Pacific Bell has also done a good job of recognizing that, despite its pending "Petition for Clarification or Reconsideration" in Gen Docket No. 93-252, it must conform its non-structural safeguard plan to comply with Parts 32 and 64 of the Commission's Rules. It is only by requiring compliance with these rules that the Commission can achieve its goal of preventing "discrimination and cross-subsidization" [3] as well as "ensur[ing] that LECs do not behave in an anticompetitive manner." [4]

Of course, because Pacific Bell chose to file its above-captioned plan before the Commission has finalized its rules governing such plans, Pacific Bell will be required to revise its plan to conform to the FCC's final rules. AirTouch strongly supports the Commission's efforts to finalize these rules quickly so that there will not be any delay in Pacific Bell's provision of PCS services. However, because that Commission proceeding is not final, any investments made by Pacific Bell regarding its provision of PCS must be done completely at its own risk and Pacific Bell should be

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[3] See Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7748 n. 96 (1993) (the "Broadband PCS Order) recon. 9 FCC Rcd 4957 (1994), further recon. 9 FCC Rcd 4441 (1994) ("Commencement of service by LECs ... would be contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization.")

[4] Id. at 7751.

estopped from claiming in the future that it is exempt from those revised rules or should be treated differently because it chose to file its proposed PCS plan early.[5]

It is also important for all parties to recognize that because "commencement of [PCS] service" by LECs such as Pacific Bell is contingent on the implementation of "an acceptable plan,"[6] any revisions or changes to Pacific Bell's plan made in response to the Commission's final requirements must also be subject to public notice and comment prior to Pacific Bell commencing commercial PCS operations. Absent such procedural protections, this proceeding should be suspended until the Commission's rules are finalized so that the public has the ability to participate fully in this important process to ensure that there are no discrimination or cross-subsidy problems. Due process and this Commission's regulations require that the public be permitted to have a full and timely opportunity to comment on whether Pacific Bell's plan lawfully complies with all final, applicable Commission rules and policies.

SUBSTANTIVE ISSUES

AirTouch recognizes that the Commission has decided to allow local exchange carriers -- including BOCs -- to provide broadband PCS without the use of a separate subsidiary. See Broadband PCS, 8 FCC Rcd at 7751. This regulatory approach

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[5] See, e.g., Order, "Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the Los Angeles-San Diego Major Trading Area (M002)," File No. 00002-CW-L-95, (DA 95-1413) (adopted and released June 23, 1995) (hereafter "PacTel PCS Order") at para 7 ("If, in the context of a future rule making proceeding, the Commission decides to apply structural separation rules or impose additional safeguards, PCS licensees will become subject to those requirements.")

[6] Broadband PCS Order, 8 FCC Rcd at 7748, n.96.

is consistent with the Commission's decision generally not to require such separate subsidiaries when LECs provide cellular services. However, this approach is fundamentally different from the Commission's decision to require BOCs to provide cellular services, including cellular services provided "out-of-region," only through the use of separate subsidiaries. See Section 22.903 of the Commission's Rules. The FCC's decision to establish the separate subsidiary requirements for BOCs presumably reflects the Commission's judgment that it is not in the public interest for BOCs to be allowed to provide cellular service without the use of separate subsidiaries.

In making its determination that LECs should be permitted to provide PCS without the need for separate subsidiaries, the Commission did not address the unique situation presented by Pacific Bell. Because of the spin-off of its affiliated cellular facilities, Pacific Bell is the only BOC that is currently not affiliated with cellular operations anywhere in its wireline service area. This means that Pacific Bell is the only BOC eligible to acquire up to 40 MHz of broadband PCS spectrum through-out the area where it provides wireline services. When the Commission concluded that LECs should be permitted to provide PCS without the need for a separate subsidiary, the Commission never specifically addressed the regulatory inconsistency associated with allowing one BOC to provide competitive broadband PCS using up to 40 Mhz of spectrum through-out its wireline region while apparently continuing to believe that it is not in the public interest to allow other BOCs to provide such services on an unseparated basis using only 25 MHz of cellular spectrum -- even outside of a BOC's wireline service area. This

inconsistency is startling since, as the Commission has often recognized, cellular and broadband PCS are -- or soon will be -- directly competitive services. [7]

It is especially important that the FCC address this serious inconsistency because absent the imposition of a separate subsidiary requirement on Pacific Bell's broadband PCS operations, the Commission will be permitting Pacific Bell to market jointly its wireline and 30 MHz broadband wireless services in Pacific Bell's wireline service area while, at the same time, prohibiting other BOCs from jointly marketing their wireline and cellular services -- both in and out-of-region. [8] Such joint marketing has very powerful competitive ramifications for broadband PCS providers and cellular carriers alike.

There does not appear to be any rational basis for the Commission allowing Pacific Bell to provide competitive broadband PCS using up to 40 MHz without

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[7] See, e.g., "Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Cellular Service Rates," PR Docket No. 94-105, Report and Order, (FCC 95-195) (released May 19, 1995) at para. 32 - 33, 100 - 104, recon. denied "Order on Reconsideration" (FCC 95-345) (released August 8, 1995). See also, "In the Matter of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications," (DA 95-890) released April 27, 1995, recon. pending at para. 17; CMRS Third Report and Order, 9 FCC Rcd 7988, 8108-8110 (1994); and Deferral of Licensing of MTA Commercial Broadband PCS, (DA 95-1410), released June 23, 1995 at 11-12 ("Assuming *arguendo* that two cellular providers in each market represent the 'baseline' level of competition, licensing of the A and B blocks will double the number of competitors.")

[8] Section 22.903 (b) (3) of the Commission's Rules specifically requires BOCs such as Pacific Bell to "employ separate .. marketing ... personnel" when they provide cellular services. The Wireless Bureau recently made clear that the separate subsidiary restrictions imposed on BOCs by Section 22.903 extend even to the resale of cellular services. See BellSouth Corporation (DA95-1401), adopted June 21, 1995; released June 22, 1995 (Wireless Telecom. Bur.).

the imposition of a separate subsidiary requirement but yet prohibiting BOCs from providing 25 MHz cellular services without the use of such separate subsidiaries. Therefore, unless the Commission decides either to eliminate Section 22.903 or to impose a separate subsidiary requirement on Pacific Bell's 30 MHz broadband PCS operations it would be unlawfully inconsistent for the Commission to approve Pacific Bell's non-structural safeguard plan as being in the public interest. See, e.g., McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) ("we remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment"); Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 237-40 (D.C. Cir. 1985) (it is unlawfully arbitrary and capricious for the FCC not to provide a rational explanation if it treats similarly situated entities differently.) See also International Longshoremen's Ass'n. v. National Mediation Bd., 870 F.2d 733, 737 (D.C. Cir. 1989) (greater explanation is required when agency appears to have acted inconsistently in prior similar situations), and Hooper v. NTSB, 841 F. 2d 1150, 1151 (D.C. Cir. 1988). [9]

To the extent that the Commission believes that this separate subsidiary issue should be addressed initially in the pending Commercial Mobile Radio Service or Revision of Part 22 rulemaking proceedings (GN Docket No. 93-252 and CC Docket No. 92-115), AirTouch respectfully requests that this pleading be considered a permissible ex parte filing in those proceedings, and that appropriate action be taken promptly by the

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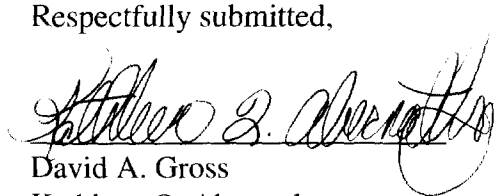
[9] The need for such similar regulatory treatment of competitors was also recently underscored by Congress when it amended Section 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993.

Commission to resolve this important issue. See, e.g., PacTel PCS Order at para. 7. Of course, "[a]ny decision made in that proceeding will be binding on PacTel and PTMS." Id.

In summary, because of the competitive similarities of having at least 30 MHz of broadband PCS spectrum and having 25 Mhz of cellular spectrum, it would be arbitrary, capricious, and unlawful for the Commission to approve as being in the public interest Pacific Bell's proposed plan that allows joint marketing of wireline and broadband PCS while at the same time believing that such joint marketing by BOCs of cellular and wireline services is not in the public interest. As a result, until such time as the Commission decides that it is in the public interest to eliminate its restrictions imposed by Section 22.903, the Commission should at least require Pacific Bell to offer its "in region" 30 MHz broadband PCS operations through a separate subsidiary consistent with the requirements of Section 22.903 or, at a bare minimum, prohibit Pacific Bell from engaging in joint broadband PCS-wireline marketing.

Respectfully submitted,



David A. Gross
Kathleen Q. Abernathy

AirTouch Communications, Inc.
1818 N St., NW, Suite 800
Washington, DC 20036
202-293-3800

Brian Kidney
Richard Nelson

AirTouch Communications, Inc.
One California Street
San Francisco, CA 94111
415-658-2000

August 16, 1995

CERTIFICATE OF SERVICE

I, Tina L. Murray, hereby certify that I have caused to be served on this 16th day of August 1995, via U.S. First Class Mail, postage prepaid, a copy of the foregoing "Comments of AirTouch Communications, Inc. Regarding Pacific Bell's Proposed Non-Structural Safeguard Plan" to the following:

James P. Tuthill
Betsy Stover Granger
Pacific Bell
140 New Montgomery Street, Rm. 1525
San Francisco, CA 94105

James L. Wurtz
Margaret E. Garber
Pacific Telesis Group - Washington
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

Rita McDonald
Federal Communications Commission
Wireless Telecommunications Bureau
Policy Division
2025 M Street, N.W., Room 5202
Washington, DC 20554

Tina L. Murray